

Kathy Sharp

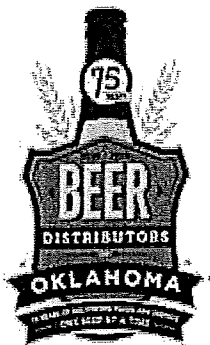
From: Brett Robinson <brett@oklahomabeer.org>
Sent: Sunday, January 07, 2018 4:40 PM
To: Kathy Sharp
Cc: Steven Barker; Shadid Heidi
Subject: Beer Distributor of Oklahoma Comments on ABLE's Proposed Permanent Rule making
Attachments: BDO comments on ABLE Proposed Permanent Rulemaking January 7 2018.pdf

Kathy,

Attached please find BDO's comments on the proposed permanent rules. Please don't hesitate to call if you have any questions or problems. Thanks,

Brett Robinson, President
Beer Distributors of Oklahoma
901 N. Lincoln Blvd., Suite 380
Oklahoma City, OK 73104

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Beer Distributors of Oklahoma

VIA ELECTRONIC MAIL

January 7, 2018

Harry "Trey" Kouri III, Esq.
Chairman, Oklahoma Alcoholic Beverage Laws Enforcement Commission
3812 N. Santa Fe, Suite 200
Oklahoma City, Oklahoma 73118

Attention: Kathy Sharp at email Kathy.Sharp@able.ok.gov.

Re: Comments from the Beer Distributors of Oklahoma on the proposed changes to the permanent rules of the Oklahoma Alcoholic Beverage Laws Enforcement Commission (ABLE).

Dear Chairman Kouri,

The Beer Distributors of Oklahoma ("BDO") was incorporated as the Oklahoma Malt Beverage Association in 1938 in Oklahoma City, Oklahoma as a not-for-profit business association. The association became the Beer Distributors of Oklahoma in 2010 to more precisely reflect the true mission of the association in advocating on behalf of Oklahoma beer distributors, the three-tier system and effective state-based alcohol regulation. BDO represents and advocates for independent beer distributors, serves as their unified voice on legislation and regulation, and encourages the safe and responsible consumption of beer.

The majority of Oklahoma beer distributors are second or third generation family-owned small businesses. The economic impact of Oklahoma's beer industry and Oklahoma's beer distributors is substantial as the industry creates jobs, contributes significant property, income and excise taxes to federal, state and local governments, and reinvests in local communities across the state. We are proud of our heritage, our state, our communities and the products we sell.

BDO would like to commend ABLE and its staff for its work in updating its rules in light of the monumental, historic, and complex changes to Oklahoma's alcohol laws in 2016 and 2017. The comments and suggestions that follow hopefully reflect the sentiment that we all realize how difficult it has been for all parties to get the constitutional, statutory, and regulatory changes right so that the public, the consumer, and industry participants will enjoy the benefits of change on October 1, 2018.

Transition between old and new systems:

1. The rules (and statutes) need to provide guidance on what each licensee is allowed to do during the interim/transition period. For example, during the 30-days prior to the effective date, when new Beer Distributor and Wine and Spirits Wholesaler licensees will be able to do things under the new rules, the old Class A and Class B Wholesaler licensees will also still be operating under the old rules. See 37A O.S. § 1-104.
2. Employee licenses 45:10-3-7. (i) For clarity and consistency, On-Premises Beer and Wine should be listed in the first sentence; (ii) The employee licenses should be limited to those who physically handle the alcoholic beverages as part of their employment; and (iii) the catch-all "or other licensee of this Commission" captures more than what is provided in 37A O.S. § 2-121, namely Beer Distributors, who should not be included in this requirement.
3. Transfer of stock by former licensee 45:10-3-30. Need to include Nonresident Seller, Class B Wholesaler, Beer Distributor, Small Brewer Self-Distributor, Brewpub Self-Distributor, Winemaker Self-Distributor, and Bottle Club licensees as applicable.
4. Restriction on Adjacent Business 45:20-3-13. Note: Retail licenses are permitted to sell goods and wares that are not alcoholic beverages for up to 20% of their business pursuant to 37A O.S. §2-156(C).
5. Beer keg sales records and identification tags 45:20-3-15. Should Small Brewers and Brewpubs be added to subsection (a)? If so, subsection (c) should also add Small Brewer Self-Distributor and Brewpub Self-Distributor.
6. Sale of entire stock of merchandise 45:40-7-2. Need to ensure that Class B and Nonresident sellers who are closing their businesses as a result of the statute change on October 1, 2018 are permitted to sell the entirety of their stock to either the new Distributor or Wholesaler or back to the Brewer or Manufacturer.

Distribution edits:

7. Nonresident sellers are no longer a part of the new beer distribution system and the references should be removed from the rules related to beer distribution.
8. In order to remain consistent with the beer distribution agreements and territory assignments of the statutes, retail licensees should be required to purchase beer and cider from the distributor in the county within which the beer or cider will be sold. By way of example, a caterer working a special event in Jackson County shall not be permitted to purchase the beer and cider from the distributor in Oklahoma County and then transport it to Jackson County for the event.
9. Self-Distribution License Subchapter 3 (45:25-3-1 through 45:25-3-5) should be clear that it is limited to Winemakers and Winemaker Self-Distributors.
10. Definitions 45:30-1-2. (i) The Brewer definition should include "Small Brewer" and the brewed products listed should be deemed to include "cider;" (ii) Nonresident Seller should be removed from the definition of a "Brewer"; (iii) Beer should be excluded from the alcoholic beverages in the definitions of "Categories," "Manufacturer," and "Wholesaler Lain-In-Cost"; and (iv) The definition of "Manufacturer" should include Rectifier, Distiller, Fermenter and Winemaker.
11. Subchapter 3 Manufacturers and Wine and Spirits Wholesalers (45:30-3-1 through 45:30-3-18) should be made clear that its provisions do not include beer. Additionally, Manufacturers are now permitted to designate Wine and Spirits Wholesalers under the Constitution and Oklahoma Statutes, leaving open the possibility for territory assignments. It appears these rules narrow the permissive nature by requiring the designation to be *a single* Wine and Spirits Wholesaler *for the entire state* of Oklahoma and eliminating the possibility of a territory assignment. Given the designation requirements, there should be added procedures for the filing of distribution agreements and the registration of designated brands similar to the beer distribution side.
12. Delivery to licensee's warehouse 45:40-3-4. Beer should be included.

Trade practice concerns:

13. There needs to be added some rules concerning the repackaging of beer, which limits the sale of beer to original packaging, with the only exception being the sale of contents in individual containers. The original 3.2 language contained such rules.

14. Offering & Accepting of Inducements 45:10-3-24 and 45:10-3-25. (i) numerous types of inducements need to be added to the list; (ii) numerous licensees need to be added to these provisions; (iii) In order to track with the federal regulations in 27 CFR Chapter 1 Part 6 Subparts A through D (as mentioned at the end of these sections), the Special Event Licensee needs to be removed; and (iv) ensure the penalty schedules reflect the severity of the violations and punish/deter the violator. Proposed language on the inducements is provided below:

45:10-3-24. Acceptance of certain inducements prohibited; exceptions

All licensed Oklahoma Wine and Spirits Wholesalers, Class B Wholesaler Beer Distributors, Small Brewer Self Distributors, Brewpub Self-Distributors, Winemaker Self-Distributors, Retail Spirit, Retail Beer, Retail Wine, Beer and Wine, Bottle Club, Mixed Beverage, On-Premises Beer and Wine, or Caterer or Special-Event licensees, their agents or employees are prohibited from accepting, directly or indirectly, any electronic or non-electronic refrigerated equipment, fixture, dispensing equipment, outdoor electric or non-electric advertising structure displaying the retailer's name, permanent shelving, supplies, discount, consumer mail-in rebate, retailer rebate, instant redeemable coupons, premiums, free goods, gifts, prizes, services of any employee, decoration, samples of alcoholic beverages, personal property, or other inducements of value from any Manufacturer, Brewer, Distiller, Rectifier, Nonresident Seller or Importer, Wine and Spirits Wholesaler, Beer Distributor, Small Brewer Self-Distributor, Brewpub Self-Distributor, Winemaker Self-Distributor, or their agents or employees, except in compliance with Title 27 CFR Chapter 1 Part 6, Subparts A through D or as allowed to be offered pursuant to 45:10-3-25.

45:10-3-25. Offering of certain inducements prohibited; exceptions

No licensed Manufacturer, Brewer, Distiller, Rectifier, Nonresident Seller, Importer, Wine and Spirits Wholesaler or Class B Wholesaler Beer Distributor, Small Brewer Self-Distributor, Brewpub Self-Distributor, Winemaker Self-Distributor, or their agents or employees, shall directly or indirectly offer, sell, trade, give or furnish any discount, free goods, electronic or non-electronic refrigerated equipment, fixture, dispensing equipment, outdoor electric or non-electric advertising structure displaying the retailer's name, permanent shelving, supplies, gifts, prizes, manufacturer's or brewer's coupons, instantly redeemable coupons, premiums, consumer mail-in rebates, retailer rebates, services of any employee, decoration, samples of alcoholic beverages, personal property, or other inducement or thing of value to any Retail Spirit, Retail Beer, Retail Wine, On-Premises Beer and Wine, Mixed Beverage, Caterer, Bottle Club or Special-Event, Wine and Spirits Wholesaler or Class B Wholesaler Beer Distributor, their agents or employees, except in compliance with Title 27 CFR Chapter 1 Part 6, Subparts A through D. Provided, that nothing in this section shall prohibit the furnishing of normal point of purchase advertising matter to such retail licensee. Further, each Beer Distributor, Small Brewer Self-Distributor, and Brewpub Self-Distributor shall be permitted to take such necessary merchandising actions for shelf replenishment, display building and quality control as allowed for in 37A O.S. §3-115.

15. Payment requirements 45:20-5-6. This section should include Beer Distributors, Small Brewer Self-Distributors, Brewpub Self-Distributors and Winemaker Self-Distributors.

16. Hours for pick-up at warehouses 45:20-5-8. This section should include Beer Distributors' warehouses and Small Brewer Self-Distributors/Brewpub Self-Distributors/Winemaker Self-Distributors premises. The hours on the beer side should be 8:00-5:00 p.m.

17. The ability for alcoholic beverages to be sold and served in Festivals and Tradeshows is too expansive as currently written and provides for an end-around to other prohibitions. Should the rights be tied to Special/Public Event licenses? Should these be limited to Small Brewers and Small Wineries?
18. Brewers brand name label registration 45:30-5-2. Subsection (a) the labels should be registered by the Brewer. Subsection (a)(5) should allow for exceptions for transition from a Brewer to a Successor Brewer and from a former NRS to a Beer Distributor based on the change in laws.
19. Beer Distributor discrimination prohibited 45:30-5-6. (i) Should include Small Brewer Self-Distributors and Brewpub Self-Distributors; (ii) Shall allow for discrimination between counties as described in 37A O.S. § 3-110; (iii) Price listing requirements should be removed because they are not filed with the Director; (iv) Subsection (c)(2) should be deleted and replaced with "Offer to sell, or sell, beer or brewed products to off-premises retail licensees at a price less than the price offered or sold to other off-premises retail licensees in the same county." and (v) The Section should include Retail Spirit and Retail Beer.
20. Business with suspended Brewer prohibited 45:30-5-13. Due to the perishable nature of the products, language should be added to require the Brewer to purchase beer and cider back from the Beer Distributor while its license is suspended so that the Beer Distributor is not paying the price for the Brewer's suspension.
21. Restriction on deliveries 45:30-5-14. Should have an exception for will call per 45:20-5-8.
22. Beer Distributors vehicle signs 45:30-5-15. Beer distributors should only be required to have their license number posted, not their name, address and the letters A.B.L.E. listed on the trucks.
23. Employees and agents must be licensed 45:30-5-16 should be deleted because it exceeds the licensing requirements of the statutes.
24. Container price different 45:30-5-17 should be deleted because it exceeds the requirements of the statutes.
25. Containers 45:40-5-1. (i) "Original packages" should be replaced with "packages and containers" to ensure all types of packages and containers can be regulated by ABLE (e.g. growlers, crowlers or any other new form of container which may not be an "original"); and (ii) Beer should be excepted from the labeling portions requiring attachment to a pricing list, which is not required for beer.

26. There needs to be added rules concerning Quality Control, as allowed under 37A O.S. §3-115. See proposed language below:

45:30-5-26. Quality Control with Grace Period

- (a) Beer Distributors, Small Brewer Self-Distributors and Brewpub Self-Distributors may withdraw from a retail licensee's stock, with the permission of the retail licensee and at the time of regular delivery, a quantity of beer or cider in undamaged original packaging if the following conditions are met:
- i. The beer or cider is withdrawn before, or immediately after the date for recommended use stamped on the beer or cider by the Brewer; and
 - ii. The beer or cider is replaced with beer or cider of identical brands, quantities, packaging and alcohol by volume as the beer or cider withdrawn.
- (b) The provisions of this Section shall not apply to beer or cider that:
- i. Has suffered damage at the retail licensee's location. Beer Distributors, Small Brewer Self-Distributors and Brewpub Self-Distributors are prohibited from giving a refund for or replacing beer or cider that was damaged while in the possession of the retail licensee. Retail licensees are prohibited from requesting or requiring the Beer Distributor, Small Brewer Self-Distributor and Brewpub Self-Distributor to remove such damaged product as a condition of continued business with the retail licensee; and
 - ii. Has a date for recommended use that expired on or before the effective date of Title 37A of the Oklahoma Statutes, except as provided herein. Distributor Agreements entered into pursuant to Title 37A of the Oklahoma Statutes may not require the Beer Distributor to pick up any beer or cider in violation of this Section. For the first thirty (30) days after the effective date of Title 37A of the Oklahoma Statutes, the Beer Distributor may elect to pick up beer or cider with a date for recommended use that has expired on or before the effective date of Title 37A of the Oklahoma Statutes. The Brewer of the expired beer or cider shall reimburse the Beer Distributor for the quantities picked-up during this 30-day grace period.
- (c) A licensee acting in violation of this Section will be subject to a suspension or termination of its license for such time as the Director or the ABLE Commission deems appropriate.

27. Donated Alcohol 45:35-5-3. We recommend the following edits:

45:35-5-3. Donated Alcohol

No alcoholic beverages may be donated except as herein provided. A Charitable Alcoholic Beverage License shall authorize the holder thereof to purchase wine, beer or spirits from a retail spirit, retail beer, retail wine, or licensed Wine and Spirits Wholesaler or Beer Distributor and to provide access to alcoholic beverages as part of their entrance fee or ticket price. ~~The license shall also allow the wine, beer or spirits to be donated~~ The donation of alcohol by a Manufacturer, Brewer, Wine and Spirits Wholesaler, Beer Distributor, Small Brewer Self-Distributor, Brewpub Self-Distributor or Winemaker Self-Distributor to a Charitable Auction, Charitable Alcoholic Beverage Event, or Special Event hosted by a not-for-profit entity shall be permitted and will not be deemed a violation of Sections 45:10-3-24 or 45:10-3-25. Provided, however, that licensees who have donated alcoholic beverages pursuant to this section who have reasonably relied on representations made by the entity accepting the donations shall have no obligation to independently determine the validity of such charitable or non-profit status.

General and consistency edits:

28. Throughout the rules, where there are sections applying to Wine & Spirits Wholesalers and Beer Distributors, the sections similarly need to apply to Small Brewer Self-Distributors, Brewpub Self-Distributors and Winemaker Self-Distributors..
29. Where there are rules intending to cover all licenses on the retail and wholesale sides of a transaction, not all of the licenses listed in 37A O.S. § 2-101 are included in the rule. (For a limited example, see: 45:10-3-13 and 45:10-3-15 (which need to have added the Small Brewer Self-Distributors, Brewpub Self-Distributors and Wine Maker Self-Distributors) and 45:10:3-23 (which needs to have added Manufacturers and Brewers in addition to Small Brewer Self-Distributors, Brewpub Self-Distributors and Wine Maker Self-Distributors).
30. Brewers and Beer Distributors Subchapter 5 (45:30-5-1 through 45:30-5-25) should be consistent to add Small Brewer Self-Distributors and Brewpub Self-Distributors as applicable.
31. Where beer is listed, cider shall also be included. For example, 45:20-9-1 and 45:20-9-2 should add "cider" after "beer."
32. Sale of other alcoholic beverages 45:20-9-3 after "alcoholic beverages" the phrase "except beer and cider" should be added for clarification.
33. In certain sections, different Commissions are referenced, such as the Oklahoma Tax Commission, the Interstate Commerce Commission, the Oklahoma Corporation Commission, thus, for clarity, wherever the ABLE Commission is intended to be referenced, "ABLE" should precede the term "Commission".
34. Are all references to "Special Event" licensees intended to include "Public Events," "Charitable Alcoholic Beverage Events," etc.?
35. Procedures for conducting hearings 45:60-3-3. Subsection (c) provides for ABLE to give "timely" notice of hearings. We request that the notice be stated to be at least "45 days prior to the scheduled hearing."

Thanks for the opportunity to comment on the proposed rules. Please feel free to contact me or our attorney, Heidi Shadid, at (918) 747-8900 or hshadid@ellerdetrich.com if you have any questions or concerns.

Brett Robinson

Brett Robinson

President
Beer Distributors of Oklahoma